Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1994

KATHRYN THOMPSON REMMEY and ERNEST M. REMMEY, Executors of the Estate of LOUISE REMMEY, Deceased,
Petitioners,

v.

PAINEWEBBER INCORPORATED and ARNOLD MARKS,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

---

APPENDIX

***David M. Clark**
CLARK, WHARTON & BERRY
Post Office Box 1349
Greensboro, NC 27402

***Counsel of Record**

LEGAL ADVANTAGE - Advocates in Appellate Services
1108 East Main Street * Richmond, VA 23219
(804) 780-0800

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KATHRYN THOMPSON REMMEY, Executrix for the Estate of Louise Remmey; ERNEST M. REMMEY, Executor for the Estate of Louise Remmey,	:	
Plaintiffs-Appellants,	:	No. 93-2059
v.	:	
PAINEWEBBER, INCORPORATED; ARNOLD MARKS,	:	
Defendants-Appellees.	:	

Appeal from the United States District Court
for the Middle District of North Carolina,
at Greensboro.
Richard C. Erwin, Senior District Judge.
(CA-90-551-2)

Argued: May 11, 1994

Decided: August 19, 1994

Before ERVIN, Chief Judge,
WILKINSON, Circuit Judge, and ELLIS,
United States District Judge for the
Eastern District of Virginia, sitting
by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Chief Judge Ervin and Judge Ellis joined.

COUNSEL

ARGUED: David McKenzie Clark, CLARK, WHARTON & BERRY, Greensboro, North Carolina, for Appellant. Mack Sperling, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P., Greensboro, North Carolina, for Appellees.

OPINION

WILKINSON, Circuit Judge:

In this case, we are asked to overturn the results of a contractually-compelled arbitration. We decline to do so. Accepting the multiple attacks upon the arbitral process in this case would scuttle the spirit of deference that courts have always used in reviewing arbitral awards. We therefore affirm the judgment of the district court upholding the arbitral decision.

I.

Louise Remmey, the original plaintiff in this case, maintained an account with appellee Arnold Marks at the brokerage firm of Hornblower & Weeks in the late 1970s. In later years, when Marks joined PaineWebber, Inc. as a broker, Remmey transferred her account to that firm. Remmey subsequently opened a Resource Management Account ("RMA") at PaineWebber, thereby allowing the company to hold securities for her and creating an interest-bearing checking account into which her dividends could be deposited.

In connection with the RMA, Remmey signed a "Client's Agreement," which included a requirement that controversies between Remmey and PaineWebber be submitted to arbitration. The provision stated essentially that arbitrations would be conducted in accordance with the rules of the New York Stock Exchange, American Stock Exchange, or National Association of

Securities Dealers. Remmey was permitted to elect which organization's rules would govern.

In early 1986, Remmey began using the RMA to keep track of her investments, and accordingly delivered most of her securities to Marks. From that time until late 1989, Marks conducted a series of trades, which substantially changed Remmey's portfolio mix. Most notably, Marks reduced the level of Remmey's ownership of bonds and other debt instruments, while establishing a significant stake in real estate limited partnerships. In August 1989, Marks left PaineWebber for a position at Prudential Bache.

In October 1990, Mrs. Remmey filed this action against Arnold Marks and PaineWebber in North Carolina federal court. She contended that Marks had knowingly induced her to purchase investments unsuited to her stated objectives and that Marks had

"churned" her account by engaging in excessive and unnecessary trading. PaineWebber responded by pointing to the arbitration clause in the RMA, prompting Remmey to sign a stipulation submitting the case to arbitration and staying the federal court action pending the result. Remmey elected to follow the rules of the National Association of Securities Dealers ("NASD"). In September and December of 1991, a panel of three arbitrators selected by the NASD heard Remmey's claims. After taking evidence for five days, the panel unanimously dismissed all of Remmey's claims against both Marks and PaineWebber.

Shortly thereafter, Remmey moved the district court to set aside the arbitral decision. In support of her motion, Remmey argued that various provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, had been violated. Specifically, Remmey maintained that the arbitrators were biased

in favor of Marks and that their ruling was substantively flawed. In an order of July 15, 1993, the district court rejected Remmey's motion, holding that "the award was proper in all respects." Remmey now appeals.[1]

II.

We must underscore at the outset the limited scope of review that courts are permitted to exercise over arbitral decisions. Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation. This policy is widely recognized, and the Supreme Court has often found occasion to approve it. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Southland Corp. v.*

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[1] On March 20, 1993, prior to the district court's final decision, Mrs. Remmey died. The executors of her estate, Kathryn and Ernest Remmey, were subsequently substituted as plaintiffs. For purposes of this opinion, we will continue to refer to appellant as "Remmey" or "Mrs. Remmey."

Keating, 465 U.S. 1, 10 (1984); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. If such were the case, one would hardly achieve the "twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3724 (U.S. Apr. 20, 1994) (No. 93-1650); *see also Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994). Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to

redo arbitral decisions. As the Seventh Circuit put it, "[a]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993).

Thus, in reviewing arbitral awards, a district or appellate court is limited to determining "'whether the arbitrators did the job they were told to do--not whether they did it well, or correctly, or reasonably, but simply whether they did it.'" *Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union*, 973 F.2d 276, 281 (4th Cir. 1992) (quoting *Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry. Co.*, 768 F.2d 914, 921 (7th Cir. 1985)). Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the

same facts. In the Federal Arbitration Act, 9 U.S.C. §§ 1-16, Congress has limited the grounds upon which an arbitral award can be vacated. Namely, a court may vacate an award:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). The statutory grounds for vacutur permit challenges on sufficiently improper conduct in the course of the proceedings; they do not permit rejection of an arbitral award based on disagreement with the particular result the arbitrators

reached. Accordingly, parties may not seek a "second bite at the apple" simply because they desire a different outcome. "To permit such attempts would transform a binding process into a purely advisory one." *Richmond, Fredericksburg & Potomac*, 973 F.2d at 282.

Finally, we note that arbitration has often been used to resolve securities laws claims brought by disappointed investors against brokerage houses. If all claims arising out of unprofitable investments were subjected to the full rigors of litigation, the result could well be increased brokerage transactions costs that would ultimately redound to the detriment of the investing public. Nothing in the Federal Arbitration Act or the various securities laws suggests that arbitral proceedings are inappropriate in this setting. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (holding that agreements to

arbitrate claims under the Securities Act of 1933 are enforceable); *McMahon*, 482 U.S. at 238 (holding that claims under the Securities Fxchange Act of 1934 are arbitrable).

III.

Appellant raises numerous challenges to the arbitral decision in this case. We address each issue in turn.

A.

Remmey's first line of attack focuses upon the arbitrators themselves. She claims that none of them were qualified to serve on the panel that heard her case. NASD Code of Arbitration Procedure § 19(b) requires that the majority of the panel members in controversies exceeding $30,000 "not be from the securities industry" unless the customer requests otherwise. Remmey maintains that potential arbitrators were required to complete questionnaires distributed by the NASD in 1990 in order to qualify as "public"

arbitrators. She concludes that the failure of arbitrators Victor Schwimmer and Stanley Lewis to submit the 1990 questionnaires barred them from service on the arbitral panel, and thus that the award was obtained by "undue means" in violation of 9 U.S.C. § 10(a)(1).

This assertion is without merit. As an initial matter, both Schwimmer and Lewis presented suitable credentials to serve on the panel. Mr. Schwimmer is an attorney who worked several years for the Securities and Exchange Commission, nearly thirty years in private practice, and an additional thirteen years as an administrative law judge for the City of New York. Mr. Lewis served sixteen years as Deputy Securities Commissioner for the state of South Carolina. Prior to that, he worked as a securities examiner in the state's Securities Division and as a stockbroker. There can be little question that Messrs. Schwimmer and Lewis were

qualified to address Remmey's claims against Marks and PaineWebber.

More significantly, nothing in the rules governing NASD arbitrations supports Remmey's contention. While she is correct in noting that § 23 of the NASD Code of Arbitration Procedure requires each arbitrator to disclose any interest in the outcome of the arbitration,[2] the Code does

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[2] Section 23 provides, in pertinent part:

> (a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:
>
> > (1) Any direct or indirect financial or personal interest in the outcome of the arbitration;
> >
> > (2) Any existing or past financial, business, professional, family, or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships that they personally have with any party or its counsel, or with any individual whom they have been

not make any mention of the 1990 questionnaire. In fact, appellant's counsel conceded at oral argument that no NASD rule required return of the questionnaire form. In order to overturn the award, Remmey must establish that a failure to complete the questionnaire impaired the ability of the arbitrators to render a fair decision. She has made no showing that failure to complete the questionnaire in any way resulted in a decision obtained by "undue means." *See* 9 U.S.C. § 10(a)(1).[3]

> told will be a witness. They should also disclose any such relationship involving members of their families or their current employers, partners, or business associates.
>
> (b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in Paragraph (a) above.

[3] Remmey contends that Lewis may have been disqualified as a public arbitrator had he returned the questionnaire. This argument is based on pure speculation. We have no reason to characterize as an "industry arbitrator" someone whose

Appellant is even more critical of arbitrator Marshall Johnson, the so-called "industry" arbitrator. Remmey alleges that Johnson was disciplined by the NASD for noncompliance with the NASD's Rules of Fair Practice, and that Johnson failed to indicate this discipline on his arbitrator questionnaire. Indeed, in 1978, Johnson and his brokerage firm, McDaniel Lewis & Co., agreed to a $500 fine for failing to keep the firm's books current, to liquidate several transactions, and to maintain adequate supervisory procedures. Johnson and his firm were fined again in 1980, in the amount of $1000, for placing identification labels over the names of managing underwriters in a number of offerings.[4]

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professional career was largely spent in enforcing state securities laws.

[4] Regardless of whether NASD rules strictly require disclosure of an arbitrator's past NASD disciplinary infractions, it seems apparent that public confidence in the NASD arbitration process

Not surprisingly, the parties differ as to the significance of these infractions. Appellants contend they were major infractions. Appellees insist they were of a minor and technical nature, and point out that they all occurred more than twelve years before the arbitration proceedings even took place. We need not resolve that issue, however, because Remmey has not shown that these infractions affected Johnson's impartiality, thereby yielding an impermissible award. Section 23 of the NASD Code requires arbitrators to disclose information which would affect their ability to decide the case impartially, such as a financial interest in the outcome. Johnson fully disclosed information he believed relevant to Remmey's claim, namely that his children were then working for Prudential Bache, Marks' current employer. After this

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would be enhanced if such information were not only available to the parties, but was in fact actually conveyed to them.

disclosure, Remmey did not exercise a peremptory challenge to Johnson, as she was permitted to do under the NASD's rules, *see* NASD Code of Arb. Proc. § 22, and she agreed to go forward with the arbitration. It would be improper to vacate an award as obtained by "undue means," 9 U.S.C. § 10(a)(1), when the information relating to Johnson's interest in the outcome was freely disclosed to Remmey before she gave her final consent to the process.

Even if appellant could demonstrate that Johnson's discipline in 1980 somehow affected his impartiality, she fails to provide us with a reason why this objection was not raised prior to the arbitration. Remmey obtained the information concerning Johnson's discipline pursuant to the NASD's "Public Disclosure Program." Although Remmey did not avail herself of this program until after the completion of the arbitration process, the program was at her

disposal before the arbitration began and nothing prevented Remmey from using it before participating in the arbitration. By raising this claim only after obtaining an adverse decision, Remmey's actions appear to constitute the ultimate attempt at a second bite. If this challenge were sustained, nothing would stop future parties to arbitration from obtaining allegedly disqualifying information, going through with the proceedings, and then coming forward with the information only if disappointed by the decision.

B.

Appellant next argues that the arbitral proceeds were conducted in a biased manner in violation of 9 U.S.C. § 10(a)(2) & (a)(3). In support of this contention, she claims that arbitrator Schwimmer, who chaired the panel, was especially solicitous of the defendants' well-being and made several comments throughout the proceedings

indicative of his empathy for the defendants. She also points to an alleged *ex parte* communication between Schwimmer and the defendants' counsel.

In attempting to secure vacatur of the arbitral decision based on "evident partiality," appellant carries a significant burden. "It is well established that a mere appearance of bias is insufficient to demonstrate evident partiality. Arbitrators are not held to the ethical standards required of Article III judges . . . ." *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (citations omitted); *see also Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992). Accordingly, appellant "must establish specific facts that indicate improper motives on the part of an arbitrator." *Peoples Sec.*, 991 F.2d at 146. Here, Remmey's evidence amounts to nothing more than an after-the-fact attack

upon an arbitrator's informal manner. Arbitrators are not strapped to a single presiding style, any more than are judges. Schwimmer's attempt to create a relaxed atmosphere did not indicate a bias in favor of either party. A review of the record indicates that his style, although colloquial, was consistent throughout the proceedings. It was no more a sign of bias for Schwimmer to tell Mr. Marks to "enjoy a wedding" than it was for him to tell appellant's step-daughter she was "with friends." His humor--or attempts at humor--were even directed at himself.[5] There is no indication, however, that he took the

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[5] After one of appellant's witnesses testified that people's dispositions change as they grow older, Schwimmer, who was then 88-years-old, quipped "Nothing personal intended, I hope." Remmey makes much of Schwimmer's age, referring to it several times in her brief. At one point, she even contends that the appointment of an 88-year-old arbitrator was violative of due process. Despite these assertions, however, a review of relevant portions of the transcript shows that Schwimmer was on top of the proceedings.

proceedings less than seriously: he devoted five days to the introduction of evidence and sustained objections from both parties as to evidence and questions put forward by the other.

Appellant's evidence regarding alleged *ex parte* contacts is equally uncompelling. Remmey points chiefly to a statement made by Schwimmer regarding seating at the proceedings. Apparently, the number of people present in the motel hearing room led to crowded conditions. At one point, during cross-examination of plaintiff's expert witness, plaintiff's counsel asked if he could switch seats with defense counsel so that plaintiff's expert and the opposing attorney would not be so close to one another. In refusing the request for a seating change, Schwimmer commented that he had talked with the defendants' counsel, who "promised to be a good boy." Remmey's contention that this statement evidences a

prejudicial *ex parte* conversation is unconvincing for two reasons. First, given Schwimmer's lighthearted style throughout the proceedings, it is unclear whether Schwimmer even had a conversation with defense counsel, and Remmey has failed to present any evidence that such a conversation occurred. Second, assuming that Schwimmer did engage in such a conversation, appellant has failed to show that any remarks regarding seating would have prejudiced her case. Failure to make such a showing bars vacatur of the arbitral award because "the party seeking a vacation of an award on the basis of ex parte conduct must demonstrate that the conduct influenced the outcome of the arbitration." ***M & A Elec. Power Coop. v. Local Union No. 702, Int'l Bhd. of Elec. Workers***, 977 F.2d 1235, 1238 (8th Cir. 1992); ***see also Employers Ins. of Wausau v. National Union Fire Ins. Co. of Pittsburgh***, 933 F.2d 1481, 1490-91

(9th Cir. 1991); *Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 57 (3d Cir. 1989). Indeed, the decision of who sits where during a proceeding is a classic discretionary call for a presiding officer. Remmey's attempt to elevate this innocuous matter into a basis for overturning the entire arbitral result is indicative of a scatter-shot attack on an adverse decision.

C.

Appellant next claims that the award must be vacated because the arbitrators "manifestly disregarded" the law in reaching their decision. *See National Wrecking*, 990 F.2d at 961. She contends that Marks' actions--including churning her account and purchasing entirely unsuitable investments--were so blatantly illegal that the arbitrators must have ignored the law in failing to grant her a favorable award.

In making a claim based on "manifest disregard," an appellant once again shoulders a heavy burden. We have previously explained that an arbitration panel's interpretation of the law will not be reversed unless the "'arbitrators understand and correctly state the law, but proceed to disregard the same.'" *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31*, 933 F.2d 225, 229 (4th Cir. 1991) (quoting *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961)). Accordingly, a court's belief that an arbitrator misapplied the law will not justify vacation of an arbitral award. Rather, appellant is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision. *See National Wrecking*, 990

F.2d at 961; *Folkways Music*, 989 F.2d at 111-12.

Remmey can make no such showing here. Over the course of five days, the panel heard evidence regarding the investments from both parties. Remmey argued to the arbitrators that she was an elderly woman, burdened with medical problems, and an easy target for Marks' manipulation. She contended that the investments purchased for her account were illiquid and excessively risky, and clearly conflicted with her goals of stability and income flow. She particularly stressed the inappropriateness of buying real estate limited partnerships for a woman of her age. Remmey further argued that her account was overtraded, and that proceeds from the sale of some investments were used to purchase substantially similar securities. Defendants responded by presenting evidence that the purchased investments were

well-suited to Remmey. The limited partnerships, for example, met Remmey's stated goals because they had the potential both to generate income and to realize long-term appreciation. Defendants contended that Marks discussed each purchase with Remmey before it was made, and that Remmey was a resolute businesswoman who kept detailed ledgers of her investments and who visited the PaineWebber office on a weekly basis. Defendants presented further evidence that the purchased partnerships were well syndicated, that the annual turnover rate in the account was far below what courts have found indicative of churning, and that some investments were sold, not to purchase inappropriate securities, but because they were starting to generate a return of principal and, therefore, a drop in Remmey's income. Defendants also noted Marks' previously unblemished record--in his 34 years in the

securities business, no one had brought a customer complaint against him prior to this action.

Thus, by the conclusion of the hearings, the arbitrators had substantial conflicting testimony which could support a decision for either of the parties. Appellant overlooks this fact and relies exclusively on testimony favoring her claims in concluding that the arbitrators ignored the law. Remmey fails to recognize that the arbitrators may well have chosen to credit evidence presented by defendants that the account was not churned, that the investments were suitable, that Remmey's liquidity was maintained, and that Remmey was competent to assess her investments. Given that the arbitrators were presented evidence upon which such conclusions could be based, we cannot simply assume that they ignored the law in reaching their conclusions.

D.

Appellant's final challenges to the arbitration award are that it is void because it (1) violates public policy, and (2) fails to constitute a "mutual, final, and definite award" as required by 9 U.S.C. § 10(a)(4). Both of these arguments are without merit.

Remmey's public policy argument is again based on a one-dimensional view of the evidence. Remmey argues that Marks' sale of limited partnerships to her without delivering current prospectuses was a violation of criminal law, *see* 15 U.S.C. § 77e, and therefore that the award in favor of Marks directly conflicts with a defined statutory mandate. What appellant fails to produce, however, is any evidence that the arbitrators found a violation of the securities laws. In a case such as this, where the arbitrators were presented with conflicting evidence on this point, there is

no reason to assume that they accepted appellant's version of the facts. Rather, the arbitral award reflects the conclusion that Marks did not make the sales without first delivering current prospectuses. The arbitrators were free to reach this conclusion, and having done so, their award does not conflict with any established public policy.

Remmey's § 10(a)(4) argument also fails. The arbitral ruling states, quite unambiguously, that "All Claims of the Claimant, Louise Remmey, against Respondents, PaineWebber, Inc. and Arnold Marks, shall be and are hereby dismissed in all respects." This statement of an arbitral decision could hardly be more final and definite. *See Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990) (holding that a similar award satisfied the "mutual, final and definite" requirements). That the arbitrators'

accompanying "Case Summary" did not mention all of Remmey's claims is of no moment here. After all, the Supreme Court has held that arbitrators need not state reasons for reaching a particular result. *See United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). Remmey's § 10(a)(4) argument appears to be merely a final attempt to secure a second shot at a recovery.

IV.

There is no doubt that the arbitrators in this case were presented with evidence that could have supported an award in favor of either of the parties. As a result, it is entirely understandable that Remmey would be disappointed with their conclusion. It is not our function as a reviewing court, however, to revisit the arguments and evidence presented to the arbitrators. Rather, our role is limited to determining whether the arbitration process itself was

flawed. Here, evidence of such a flaw is lacking, and therefore the arbitral result may not be disturbed.

For the foregoing reasons, the judgment of the district court denying appellant's motion to vacate the arbitration award is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

LOUISE REMMEY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	2:90CV00551
	:	
PAINEWEBBER, INC., and ARNOLD MARKS,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

ERWIN, Senior Judge

In this civil action which was filed on October 29, 1990, plaintiff seeks recovery

from defendants Arnold Marks, an individual stockbroker, and his employer, Painewebber, for fraud under both federal and state laws, breach of fiduciary duty, and negligence. Before answering the complaint, counsel for Painewebber presented plaintiff's counsel a purported contract signed by Mrs. Louise Remmey in 1984 agreeing to arbitrate any controversies which might arise out of her brokerage account with defendants. The parties agreed to allow arbitration of the dispute.

Accordingly, it was decided, in the interest of allowing the matter to go forward without the delay and added expense of litigating the validity of the arbitration agreement, that a stipulation allowing arbitration would be signed. Thereafter, in accordance with arbitration procedure, plaintiff presented a statement of claim, and defendants filed a response.

The Arbitrators

The contract signed by Mrs. Remmey which provided for arbitration allowed her to choose from arbitration panels provided either by the New York Stock Exchange (NYSE), the National Association of Securities Dealers (NASD), or the Chicago Board of Options Exchange (CBOE). The CBOE was obviously inappropriate since options were not involved. The NYSE indicated that its arbitration sessions would be held in Charlotte or in Raleigh. The administrator for the NASD advised that arbitration hearings, if the NASD was chosen, would be held in Greensboro. Accordingly, plaintiff chose the NASD.

The proposed panelists, whose names were submitted by NASD, were H. Victor Schwimmer, former administrative law judge of New York City, Chairman; Stanley V. Lewis, a former Deputy Securities Commissioner from South Carolina, who

previously worked in the securities business after completion of two years at Guilford College; and Drew Waterbury, a person currently employed in the securities industry with a firm known as Quick and Riley, location undisclosed.

By August 29, 1991, before the initial arbitration hearings began on September 11, 1991, the parties were informed that Drew Waterbury had withdrawn from the panel and that Marshall H. Johnson, McDaniel Lewis & Company, Greensboro, North Carolina, had been substituted in his place. Plaintiff's counsel was informed by telephone by the NASD administrator, Ms. June Riley, that one of Mr. Johnson's children worked as a broker at Prudential Bache, the firm where Marks was then employed. When plaintiff's counsel expressed dissatisfaction with the panel, he was told by Ms. Riley that unless this panel was satisfactory, it would be necessary to move the arbitration from Greensboro, since

she could not obtain arbitrators willing to come to Greensboro. Ms. Riley reported verbally that Arbitrator Johnson had indicated that the presence of his family members at Prudential Bache would not affect his fairness at the hearing. Plaintiff does not now contend that such relationship had any bearing on the outcome of this case.

The Award

Plaintiff Louise Remmey, alleged that defendant Arnold Marks (Marks), a broker at Painewebber, Inc., churned her account which she opened at Painewebber at the beginning of 1987. Plaintiff, a widow who is eighty-six years old, further alleged that she is of ill health and that defendants were aware of her deteriorating mental and physical capacities but nevertheless sold most of her high-quality, high-yield investments, frequently at a loss, and purchased for her account illiquid, speculative, and high risk investments such

as limited partnerships and equity and bond funds that were unsuitable and not in keeping with her investment objectives. Plaintiff stated that a result of Marks' conduct, she sustained great realized losses from transactions in her account and that Painewebber is liable for the activities of its agent, Marks.

Defendants Painewebber, Inc. and Arnold Marks denied the allegations contained in the Statement of Claim and stated that they are not liable to plaintiff for losses in any amount. Defendants maintained that plaintiff was a knowledgeable investor with a desire to generate income and a hope to realize long term appreciation in her account and that Marks' handling of her account was consistent with both objectives. Defendants further maintained that upon a full analysis of plaintiff's account, it would be demonstrated that plaintiff realized substantial profits.

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. All claims of plaintiff Louise Remmey against defendants Painewebber, Inc. and Arnold Marks shall be and are hereby dismissed in all respects.

2. The parties shall each bear their own costs including attorneys' fees.

Discussion

The plaintiff alleged in her complaint that 9 U.S.C.A. § 10 (1947) has been violated by defendants and that the award entered by the arbitrators should be vacated.

This court agrees with the rule of law as stated by District Court Judge Hamilton (now United States Circuit Judge) in Atlantic Shores Resort v. Martin, 731 F.

Supp. 1279, 1282 (D.S.C. 1990). "Perhaps most important, the burden of proof falls squarely on the party moving to vacate the arbitration award, see Andros Compania Maritima v. Marc Rich & Co., A.G., 579 F.2d 691, 700 (2d Cir. 1978), who must "establish substantially more than an erroneous conclusion of law or fact."

Section 10 of the Act provides:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not

> expired, the court may, in its discretion, direct a rehearing by the arbitrators.

The plaintiff contends that Arbitrator Johnson's falsification of his sworn application is misconduct and that the ex parte contacts by Arbitrator Schwimmer with defense counsel and/or defendant Marks was sufficient to show prejudicial behavior. These contentions arose prior to arbitration. They were not settled. The plaintiff brought them forward at the arbitration proceedings. The plaintiff attempted to gain additional information with reference to the arbitrators, but such was not received at the date the arbitration began; but nevertheless, plaintiff proceeded with the hearing.

The arbitrators' award as set out above was summary in nature and without findings of fact. However, the law in this event concludes that any alleged bias on the part of the arbitrators cannot be the bias for

vacating an award unless the interest or bias is "direct, definite and capable of demonstration rather than remote, uncertain, or speculative." Atlantic Shores Resort v. Martin, 731 F. Supp. at 1283. The evidence does not suggest this standard. The evidence does not support a violation under Section 10 of the Act.

Standard of Review

> The bases for review of arbitration awards are enumerated in 9 U.S.C. § 10, supra . . . . The statute does not allow courts to roam unbridled in their oversight of arbitral awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in certain specific ways. In fine, section 10 authorizes vacatur of an award in cases of specified misconduct or misbehavior on the arbitrators' part, actions in excess of arbitral powers, or failure to consummate the award." See, Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l Ltd., 888 F.2d 260, 264-65 (2d Cir. 1989). The statute contains no express ground upon which an award can be overturned because it rests on garden-variety factual or legal bevues. To the precise contrary, courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." United Paperworkers Int'l Union v. Misco,

> Inc., 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L.Ed.2d 286 (1987). Even where such error is painfully clear, "courts are not authorized to reconsider the merits of arbitration awards . . . ." S.D. Warren Co. v. United Paperworkers' Int'l. Union, Local 1069, 845 F.2d 3, 7 (1st Cir.), cert. denied, 488 U.S. 992, 109 S.Ct. 555, 102 L.Ed.2d 582 (1988).

Advest v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990).

The court notes that evidence was taken over a course of four days. The evidence presented by the parties conflicted; the results being that the arbitrators could find facts inconsistent with contentions from either party.

As bad as the plaintiff contends her case is and her desire to have the award vacated, the court must deny the same and hold that the award was proper in all respects. A Judgment will be rendered contemporaneously herewith.

Richard C. Erwin

United States District Judge

December 14, 1992.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

LOUISE REMMEY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	2:90CV00551
	:	
PAINEWEBBER, INC., and ARNOLD MARKS,	:	
	:	
Defendants.	:	

FINAL JUDGMENT

The arbitration award appealed from by the plaintiff is hereby confirmed in all respects and is hereby considered as the Judgment of this court. Each party will pay its own cost.

IT IS SO ORDERED.

Richard C. Erwin

United States District Judge

December 14, 1992

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

KATHRYN THOMAS (sic) REMMEY and ERNEST M. REMMEY, Executors of the Estate of LOUISE REMMEY, deceased,	:	
Plaintiffs,	:	
v.	:	2:90CV00551
PAINEWEBBER, INC., and ARNOLD MARKS,	:	
Defendants.	:	

SUBSTITUTE JUDGMENT

In this civil action which was filed on October 29, 1990, Mrs. Louise Remmey seeks recovery from defendants Arnold Marks, an individual stockbroker, and his employer, Painewebber, for fraud under both federal and state laws, breach of fiduciary duty,

and negligence. Before answering the complaint, counsel for Painewebber presented Mrs. Remmey's counsel a purported contract signed by her in 1984 agreeing to arbitrate any controversies which might arise out of her brokerage account with defendants. The parties agreed to allow arbitration of the dispute.

Accordingly, it was decided, in the interest of allowing the matter to go forward without the delay and added expense of litigating the validity of the arbitration agreement, that a stipulation allowing arbitration would be signed. Thereafter, in accordance with arbitration procedure, Louise Remmey presented a statement of claim, and defendants filed a response.

The Arbitrators

The contract signed by Mrs. Remmey which provided for arbitration allowed her to choose from arbitration panels provided

either by the New York Stock Exchange (NYSE), the National Association of Securities Dealers (NASD), or the Chicago Board of Options Exchange (CBOE). The CBOE was obviously inappropriate since options were not involved. The NYSE indicated that its arbitration sessions would be held in Charlotte or in Raleigh. The administrator for the NASD advised that arbitration hearings, if the NASD was chosen, would be held in Greensboro. Accordingly, Mrs. Remmey with counsel chose the NASD.

The proposed panelists, whose names were submitted by NASD, were H. Victor Schwimmer, former administrative law judge of New York City, Chairman; Stanley V. Lewis, a former Deputy Securities Commissioner from South Carolina, who previously worked in the securities business after completion of two years at Guilford College; and Drew Waterbury, a person currently employed in the securities

industry with a firm known as Quick and Riley, location undisclosed.

By August 29, 1991, before the initial arbitration hearings began on September 11, 1991, the parties were informed that Drew Waterbury had withdrawn from the panel and that Marshall H. Johnson, McDaniel Lewis & Company, Greensboro, North Carolina, had been substituted in his place. Mrs. Remmey's counsel was informed by telephone by the NASD administrator, Ms. June Riley, that one of Mr. Johnson's children worked as a broker at Prudential Bache, the firm where Marks was then employed. When Mrs. Remmey's counsel expressed dissatisfaction with the panel, he was told by Ms. Riley that unless this panel was satisfactory, it would be necessary to move the arbitration from Greensboro, since she could not obtain arbitrators willing to come to Greensboro. Ms. Riley reported verbally that Arbitrator Johnson had indicated that the presence of

his family members at Prudential Bache would not affect his fairness at the hearing. The substitute plaintiffs do not now contend that such relationship had any bearing on the outcome of this case.

The Award

Mrs. Louise Remmey alleged that defendant Arnold Marks (Marks), a broker at Painewebber, Inc., churned her account which she opened at Painewebber at the beginning of 1987. Mrs. Louise Remmey, a widow who was eighty-six years old at the time, alleged that she was of ill health and that defendants were aware of her deteriorating mental and physical capacities but nevertheless sold most of her high-quality, high-yield investments, frequently at a loss, and purchased for her account illiquid, speculative, and high-risk investments such as limited partnerships and equity and bond funds that were unsuitable and not in keeping with her investment

objectives. She stated that a result of Marks' conduct, she sustained great realized losses from transactions in her account and that Painewebber is liable for the activities of its agent, Marks.

Defendants Painewebber, Inc. and Arnold Marks denied the allegations contained in the Statement of Claim and stated that they are not liable for losses in any amount. Defendants maintained that Mrs. Remmey was a knowledgeable investor with a desire to generate income and a hope to realize long term appreciation in her account and that Marks' handling of her account was consistent with both objectives. Defendants further maintained that upon a full analysis of Mrs. Remmey's account, it would be demonstrated that she realized substantial profits.

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have

decided in full and final resolution of the issues submitted for determination as follows:

1. All claims of Louise Remmey against defendants Painewebber, Inc. and Arnold Marks shall be and are hereby dismissed in all respects.

2. The parties shall each bear their own costs including attorneys' fees.

Discussion

Louise Remmey alleged in her complaint that 9 U.S.C.A. § 10 (1947) has been violated by defendants and that the award entered by the arbitrators should be vacated.

This court agrees with the rule of law as stated by District Court Judge Hamilton (now United States Circuit Judge) in Atlantic Shores Resort v. Martin, 731 F. Supp. 1279, 1282 (D.S.C. 1990).

> Perhaps most important, the burden of proof falls squarely on the party moving to vacate the arbitration award, see Andros Compania Maritima v. Marc Rich & Co., A.G., 579 F.2d 691, 700 (2d

Cir. 1978), who must "establish substantially more than an erroneous conclusion of law or fact. Local Union No. 251 v. Narragansett Improvement Co., 503 F.2d 309, 312 (1st Cir. 1974) (emphasis added).

Section 10 of the Act provides:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them (sic)
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

Louise Remmey contends that Arbitrator Johnson's falsification of his sworn

application is misconduct and that the ex parte contacts by Arbitrator Schwimmer with defense counsel and/or defendant Marks was sufficient to show prejudicial behavior. These contentions arose during arbitration. They were not settled. Louise Remmey brought them forward at the arbitration proceedings and attempted to gain additional information with reference to the arbitrators, but such was not received at the date the arbitration began; but nevertheless, she proceeded with the hearing.

The arbitrators' award as set out above was summary in nature and without findings of fact. However, the law in this event concludes that any alleged bias on the part of the arbitrators cannot be the basis for vacating an award unless the interest or bias is "direct, definite and capable of demonstration rather than remote, uncertain, or speculative." Atlantic Shores Resort v.

Martin, 731 F. Supp. at 1283. The evidence does not suggest this standard, neither does it support a violation under Section 10 of the Act.

Standard of Review

> The bases for review of arbitration awards are enumerated in 9 U.S.C. § 10, supra . . . . The statute does not allow courts to roam unbridled in their oversight of arbitral awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in certain specific ways. In fine, section 10 authorizes vacatur of an award in cases of specified misconduct or misbehavior on the arbitrators' part, actions in excess of arbitral powers, or failure to consummate the award. See Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l Ltd., 888 F.2d 260, 264-65 (2d Cir. 1989). The statute contains no express ground upon which an award can be overturned because it rests on garden-variety factual or legal bevues. To the precise contrary, courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L.Ed.2d 286 (1987). Even where such error is painfully clear, "courts are not authorized to reconsider the merits of arbitration awards . . . ." S.D. Warren Co. v. United Paperworkers' Int'l. Union, Local 1069, 845 F.2d 3, 7 (1st Cir.), cert. denied, 488 U.S. 992,

109 S.Ct. 555, 102 L.Ed.2d 582 (1988). (Footnote omitted.)

Advest v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990).

The court notes that evidence was taken over a course of four days. The evidence presented by the parties conflicted; the results being that the arbitrators could find facts inconsistent with contentions from either party.

As bad as Mrs. Remmey contends her case is and her desire to have the award vacated, the court must deny the same and hold that the award was proper in all respects.

Richard C. Erwin

United States District Judge

July 15, 1993

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

KATHRYN THOMAS (sic) REMMEY and ERNEST M. REMMEY, Executors of the Estate of LOUISE REMMEY, deceased,	:	
Plaintiffs,	:	
v.	:	2:90CV00551
PAINEWEBBER, INC., and ARNOLD MARKS,	:	
Defendants.	:	

MEMORANDUM AUTHORIZING A SUBSTITUTE JUDGMENT

This case is before the court on motion of plaintiffs which reads: "Plaintiff, pursuant to Federal Rules of Civil Procedure 52(b) and 59, moves the Court to amend its findings and make additional findings and to amend the judgment in the above case accordingly." The court finds that the motion was timely filed.

The court is of the opinion that part of the motion relating to the last paragraph of page 5 of the court's memorandum opinion could be written clearer than it now stands. Therefore, a new page 5 of December 14, 1992 will be substituted in the substitute judgment in this case.

All other contentions of the plaintiffs in the above-described motion have been reviewed by the court, and the court has found all those contentions to be without merit. The court notes that the plaintiffs do not contend that such alleged new affidavits of the plaintiffs will be sufficient to change the judgment heretofore entered. It does appear that the plaintiffs have added a second occasion to argue their original contentions. The court realized that the events contained in this case are difficult for the court; but, nevertheless, the case law and the statute require this result.

IT IS THEREFORE ORDERED that all other contentions of plaintiffs are DENIED as being without merit.

Richard C. Erwin

United States District Judge

July 15, 1993.

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Louise Remmey

91-00567

Name of Respondent(s)

PaineWebber, Inc.
Arnold Marks

REPRESENTATION

For Claimant: David M. Clark, Esq. of Clark Wharton & Berry.

For Respondents: Gary J. Stegeland, Esq., in-house Counsel for PaineWebber, Inc.

CASE INFORMATION

Statement of Claim filed: February 21, 1991.

Claimant's Submission agreement signed on: January 17, 1991.

Joint Statement of Answer of Respondents filed on: April 18, 1991.

Respondent, PaineWebber, Inc.'s Submission Agreement signed on: April 8, 1991.

Respondent, Arnold S. Marks' Submission Agreement signed on: April 8, 1991.

HEARING INFORMATION

Hearing Date/Sessions:

September 11, 1991-Two (2) Sessions.

September 12, 1991-Two (2) Sessions.

December 4, 1991-Two (2) Sessions.

December 5, 1991-Two (2) Sessions.

December 6, 1991-Two (2) Sessions.

Total number of hearing sessions - Ten (10) Sessions.

Hearing Location: Greensboro, NC.

CASE SUMMARY

Claimant, Louise Remmey, alleged that Respondent, Arnold Marks (Marks), a broker at PaineWebber, Inc. (PaineWebber) churned her account which she opened at PaineWebber at the beginning of 1987. Claimant, a widow who is 86 years old, further alleged that she is of ill health and that Respondents were aware of her deteriorating mental and physical capacities but nevertheless sold most of her high-quality, high-yield investments, frequently at a loss, and purchased for her account illiquid, speculative and high risk investments such as limited partnerships and equity and bond funds that were unsuitable and not in keeping with her investment objectives. Claimant stated that as a result of Marks' conduct, she sustained great realized losses

from transactions in her account and that PaineWebber is liable for the activities of its agent, Marks.

Respondents, PaineWebber, Inc. and Arnold Marks, denied the allegations contained in the Statement of Claim and stated that they are not liable to Claimant for losses in any amount. Respondents maintained that Claimant was a knowledgeable investor with a desire to generate income and a hope to realize long term appreciation in her account and that Marks' handling of her account was consistent with both objectives. Respondents further maintained that upon a full analysis of Claimants (sic) account it would be demonstrated that Claimant realized substantial profits.

RELIEF REQUESTED

Claimant requested monetary damages of $692,519.00 or in the alternative $481,030.00 and rescission of the limited partnership acquisitions with Respondent,

PaineWebber, Inc. taking back the limited partnership acquisitions. Claimant also requested an award of punitive damages.

Respondents requested that the Statement of Claim be dismissed and that the cost of these proceedings, including attorneys' fees be assessed against Claimant or the party responsible for instituting this suit.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the

issues submitted for determination as follows:

1. All Claims of the Claimant, Louise Remmey, against Respondents, PaineWebber, Inc. and Arnold Marks, shall be and are hereby dismissed in all respects;

2. The parties shall each bear their own costs including attorneys' fees.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the NASD, Inc. shall retain the $250.00 non-refundable filing fee previously deposited by the Claimant and the following Forum Fees are assessed:

10 Sessions x $1,000.00 = $10,000.00

Forum Fees assessed against:

1- Claimant, in the amount of $5,000.00; however, the NASD, Inc. shall retain the $1,000.00 hearing session deposit previously deposited by Claimant to offset

this fee, thereby the amount due and owing by Claimant equals $4,000.00.

2- Respondent, PaineWebber, Inc., in the amount of $5,000.00.

Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATION PANEL

H. Victor Schwimmer, Esq. Public/Chairman

Stanley V. Lewis Public/Panelist

Marshall H. Johnson Industry/Panelist

Date of Decision: January 17, 1992

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed September 13, 1994

No. 93-2059
CA-90-551-2

KATHRYN THOMPSON REMMEY, Executrix for the Estate of Louise Remmey; ERNEST M. REMMEY, Executor for the Estate of Louise Remmey
Plaintiffs - Appellants

v.

PAINEWEBBER, INCORPORATED; ARNOLD MARKS
Defendants - Appellees

On Petition for Rehearing With Suggestion for Rehearing In Banc

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The appellants petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

9 U.S.C. § 10

Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

NASD Manual--Code of Arbitration Procedure

Sec. 19. Designation of Number of Arbitrators (b) In arbitration matters involving public customers and where the amount in controversy exceeds $30,000, or where the matter in controversy does not

involve or disclose a money claim, the Director of Arbitration shall appoint an arbitration panel which consists of no fewer than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(c) An arbitrator will be deemed as being from the securities industry if he or she:

(1) is a person associated with a member or other broker/dealer, municipal securities dealer, government securities broker, or government securities dealer, or

(2) has been associated with any of the above within the past three (3) years, or

(3) is retired (that is, continues to receive compensation,

other than social security or self-funded benefits) from any of the above, or

(4) has a spouse or other member of the household who is a person associated with any of the above, or

(5) is an attorney, accountant, or other professional who has devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two years.

(d) An arbitrator who is not from the securities industry shall be deemed a public arbitrator.

NASD Manual--Code of Arbitration Procedure

Sec. 21. Notice of Selection of Arbitrators

The Director of Arbitration shall inform the parties of the arbitrators' names and employment histories for the past ten

(10) years, as well as information disclosed pursuant to Section 23, at least eight (8) business days prior to the date fixed for the first hearing session. A party may make further inquiry of the Director of Arbitration concerning an arbitrator's background. In the event that prior to the first hearing session, any arbitrator should become disqualified, resign, die, refuse or otherwise be unable to perform as an arbitrator, the Director of Arbitration shall appoint a replacement arbitrator to fill the vacancy on the panel. The Director of Arbitration shall inform the parties as soon as possible of the name and employment history of the replacement arbitrator for the past ten years, as well as information disclosed pursuant to Section 23. A party may make further inquiry of the Director of Arbitration concerning the replacement arbitrator's background and within the time remaining prior to the first hearing session

or the five (5) day period provided under Section 22, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Section 22.

NASD Manual--Code of Arbitration Procedure

Sec. 22. Peremptory Challenge

In any arbitration proceeding, each party shall have the right to one peremptory challenge. In arbitrations where there are multiple Claimants, Respondents and/or Third-Party Respondents, the Claimants shall have one peremptory challenge, the Respondents shall have one peremptory challenge and the Third-Party Respondents shall have one peremptory challenge, unless the Director of Arbitration determines that the interest of justice would best be served by awarding additional peremptory challenges. Unless extended by the Director

of Arbitration, a party wishing to exercise a peremptory challenge must do so by notifying the Director of Arbitration in writing within five (5) business days of notification of the identity of the persons named to the panel. There shall be unlimited challenges for cause.

NASD Manual--Code of Arbitration Procedure

Sec. 23. Disclosures Required of Arbitrators

(a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional,

family, or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships that they personally have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationship involving members of their families or their current employers, partners, or business associates.

(b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in Paragraph (a) above.

(c) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from

rendering an objective and impartial determination described in subsection (a) hereof is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

(d) Prior to the commencement of the first hearing session, the Director of Arbitration may remove an arbitrator based on information disclosed pursuant to this section. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this Section if the arbitrator who disclosed the information is not removed.

NASD Manual--Rules of Fair Practice

ARTICLE III

Sec. 1. Business Conduct of Members

A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.

Sec. 2. Recommendations to Customers.

In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

NASD Manual--Rules of Fair Practice

APPENDIX F

Sec. 3. Suitability

(a) A member or person associated with a member shall not underwrite or participate in a public offering of a direct participation program unless standards of

suitability have been established by the program for participants therein and such standards are fully disclosed in the prospectus and are consistent with the provisions of subsection (b) of this section.

(b) In recommending to a participant the purchase, sale or exchange of an interest in a direct participation program, a member or person associated with a member shall:

(1) have reasonable grounds to believe, on the basis of information obtained from the participant concerning his investment objectives, other investments, financial situation and needs, and any other information known by the member or associated person, that:

(i) the participant is or will be in a financial position appropriate to enable him to

realize to a significant extent the benefits described in the prospectus, including the tax benefits where they are a significant aspect of the program;

(ii) the participant has a fair market net worth sufficient to sustain the risks inherent in the program, including loss of investment and lack of liquidity; and

(iii) the program is otherwise suitable for the participant; and

(2) maintain in the files of the member documents disclosing the basis upon which the determination of suitability was reached as to each participant.

LETTER FROM DAVID M. CLARK

August 7, 1991

FAX NO. 212-858-4389

Ms. June Riley
Arbitration Administrator
National Association of Securities Dealers, Inc.
33 Whitehall Street
Eighth Floor
New York, New York 10004

Re: Louise Remmey v. PaineWebber Incorporated and Arnold Marks
NASD Case # 91-00567

Dear Ms. Riley:

This is further with regard to my request for information about the arbitrators. As you know, the only information so far presented to us is that contained on the so-called arbitrator disclosure sheets, copies of which are attached hereto, and really provide no information. As you know, by letters of July 26 and July 29, 1991, I requested certain additional information.

I now understand that the NASD maintains files on each of the arbitrators. I should like to see the contents of the files on each of the arbitrators named in this case. If there is certain information in those files which the NASD feels would be inappropriate to disclose, this information can be redacted, with a statement as to what type of information is being redacted. Otherwise, I see no reason we should not have access to any information available. For example, and without limitation, I understand that the arbitrators have each filed applications for appointment as arbitrators. I would like to see those applications.

You have certainly been most cooperative and helpful throughout this matter, and I appreciate it.

Sincerely yours,

David M. Clark

mtb

cc: Ms. Debbie Mussuci (via fax)

Mrs. Kaye Grove

LETTER FROM DAVID M. CLARK

August 21, 1991

FAX NO. 212-858-4389

Ms. June Riley, Arbitration Administrator
National Association of Securities Dealers, Inc.
33 Whitehall Street, Eighth Floor
New York, New York 10004

Re: Louise Remmey v. PaineWebbber Incorporated et al
NASD Case # 91-00567

Dear Ms. Riley:

I received today your fax of 19:48 hours on August 19, 1991. The letter you faxed bore a date of August 8, 1991, but I have not received it. Perhaps in the future if you will use our post office box, No. 1349, the regular mail will be delivered more efficiently. I also received by fax

today your indication that the above matter has been rescheduled for September 11, 1991, at Greensboro. You have not indicated where in Greensboro the hearing will be held.

Respectfully, I do not believe the information you have provided as to the arbitrators, Mr. Schwimmer and Mr. Lewis, meets our requests for information as set forth in my previous correspondence. I would appreciate your calling me to discuss the additional information we requested at your earliest convenience. Also, please refer to the second paragraph in my letter of August 7, 1991.

Obviously, we cannot make a choice as to any peremptory challenges with regard to this panel, if any, until the third arbitrator is appointed.

Thank you for your cooperation.

Yours very truly,

David M. Clark

mtb

cc: Ms. Debbie Mussuci (via fax)

Mrs. Kaye Grove

LETTER FROM DAVID M. CLARK

August 27, 1991

FAX NO. 212-858-4389

Ms. June Riley, Arbitration Administrator
National Association of Securities Dealers, Inc.
33 Whitehall Street, Eighth Floor
New York, New York 10004

Re: Louise Remmey v. PaineWebber Incorporated et al
NASD Case # 91-00567

Dear Ms. Riley:

Arbitration in the above case is scheduled to begin on September 11, 1991. I received yesterday for the first time many documents produced by PaineWebber. Even now, I have not received all the documents to which we are entitled. Obviously, this puts us at a considerable disadvantage so far as being prepared is concerned, but I am

continuing to make a good faith effort to meet the schedule if it can be done consistent with the interest of our client.

I would remind you that there still has not been appointed a third arbitrator for this case. Obviously, I cannot know which arbitrators to excuse peremptorily or object to without knowing the full panel. Nor can I ask an arbitrator to settle any discovery disputes until I know which arbitrators will be serving.

This is not your ordinary arbitration. It involves in excess of $500,000. I would ask that you give the matter priority.

I would ask for the third time that you provide for us the information in your files, including the arbitrator's applications, regarding the arbitrators and their background, together with the other information requested by our earlier letters. Anything less will deprive us of

due process. Please respond to this request one way or the other.

Yours very truly,

David M. Clark

mtb

cc: Ms. Debbie Mussuci (via fax)
Garry J. Stegeland (via fax)
Mrs. Kaye Grove

NASD MEMORANDUM

TO: NASD Arbitrator

FROM: Deborah Masucci,
Director of Arbitration

RE: Arbitrator Profile Update

DATE: March 26, 1990

I would like to take this opportunity to thank you for participating in the Association's arbitration program. The success of the program depends in large

measure upon the professionalism you bring to the arbitration forum.

In June 1987, the Supreme Court of the United States had occasion to review the issue of enforcement of arbitration agreements in the Shearson Lehman/American Express, Inc. vs. McMahon case. The Court, in substance, ruled that there is a federal policy favoring arbitration and that the policy requires courts to rigorously enforce arbitration agreements. Their opinion was based on an underlying belief that arbitration 2 (sic) forums provide a fair, just, and prompt resolution of securities disputes.

There was, however, skepticism from both the Court and the Securities and Exchange Commission ("SEC") regarding the perception of fairness in having certain individuals with industry ties classified as public arbitrators. This skepticism was detailed by the SEC in a letter to the NASD and other

self-regulatory organizations recommending certain categories to be excluded from the pool of public arbitrators. After thorough consideration and debate by the National Arbitration Committee, the NASD amended its Code of Arbitration Procedure in response to the SEC's request. On May 10, 1989, the SEC approved these amendments which exclude the following categories of individuals from serving as a public arbitrator.

a. A person associated with a member or other broker/dealer, municipal securities dealer, government securities broker/dealer, or;

b. A person who has been associated with any of the above within the past three (3) years, or;

c. A person who is retired from any of the above, or;

d. An attorney, accountant, or other professional who has devoted twenty (20) percent or more of his

or her individual professional work effort to securities industry clients within the last two years (this does not carry over to other members of the firm who do not have such substantial contacts); (sic) although it must be disclosed);

e. A spouse or other household member of a person who is associated with a member or other broker/dealer, municipal securities dealer, government securities broker/dealer, or;

f. An employee of a bank or other firm (*i.e.*, Sears Roebuck and Prudential Insurance Company) to the extent that their personal employment involvement is with securities activities.

We are developing an updated computer software system to better handle the

processing of NASD arbitrations. The new database requires some additional information from our arbitrators. The additional information which will assist us in classifying arbitrators as securities or public arbitrators in accordance with the provisions of the new rules. (sic)

It is likely that a number of individuals now serving as public arbitrators will be reclassified as securities arbitrators or be removed from the national pool. In order to accurately make this determination, we ask that you fill cut the enclosed questionnaire and return it to the address below.

Arbitrators should make a reasonable effort to inform themselves of any interests or relationships described above. In addition, the obligation to disclose interests or relationships is a continuing duty, and the NASD Arbitration Department should be informed as changes occur.

Please complete the attached questionnaire and return it to the following address on or before ( ): (sic)

(REGIONAL OFFICE CONTACT AND ADDRESS)

If you have any questions, please feel free to contact (NAME OF CONTACT) at (REGIONAL OFFICE PHONE NUMBER). Thank you for your assistance in this effort.

DM:bb:js

Enclosure

STANLEY V. LEWIS
5307 LAKESHORE DR.
COLUMBIA, SC 29206
803-787-1820

CURRICULUM VITAE

Retired Deputy Securities Commissioner
State of South Carolina (1973-1989)
Chief Examiner, South Carolina Securities Commission (1970-1973)
Broker, G.H. Crawford Co., Columbia South Carolina (1965-1970)

Qualified as expert witness in South Carolina Courts

Testified in numerous cases in State and Federal Courts and arbitration proceedings in South Carolina, North Carolina and Georgia.

Have taught Securities Law and Limited Partnerships at CLE and Bar Association classes. Lecturer at the Universities of North and South Carolina Law Schools. Lecturer at the Universidad de Valle, and Javeriana University, in Cali, Columbia SA

Panelist in various SEC, NASD and North American Securities Administrators Association panels concerning Arbitration and Broker Dealer and Investment Advisor problems.

Enrolled as an arbitrator, on the arbitration panels of the NASD, American Arbitration Association, the New York Stock Exchange, the American Stock Exchange and the National Futures Association.

Assisted in design and implementation and enhancement of nation-wide computerized Central Registration Depository (CRD) securities agent and broker-dealer licensing system.

Former member of Board of Directors of The North American Securities Administrators Association.

Served as Parliamentarian for NASAA business meetings.

Served as Chairman of Non-Profit Issuer Committee.

Served as Chairman of Theatrical Issuer Committee.

Former member of Oil and Gas Committee.

Member of Central Registration Depository Committee.

Born: Portsmouth, Ohio August 2, 1919

Married, no children

Attended private elementary and high schools, Portsmouth, Ohio

Attended Guilford College, Greensboro, NC and University of South Carolina.

[handwritten:] Input 8/29/91

NASD

April 15, 1992
(Faxed)

DAVID CLARK

125 SOUTH ELM ST.

GREENSBUROUGH (sic), NC 27402

PUBLIC DISCLOSURE PROGRAM

RESPONSE TO REQUEST FOR INFORMATION

The Board of Governors of the National Association of Securities Dealers, Inc. (NASD) has adopted a public disclosure policy which permits certain types of disciplinary information on NASD member firms and associated persons to be available to the general public. Section 15A(i) of the Securities Exchange Act of 1934, as amended, requires registered securities

associations to respond to inquiries regarding disciplinary actions involving its members and their associated persons. The NASD believes that the general public should have access to information which will help them in their determination whether to conduct or continue to conduct business with an NASD member or any of the member's associated persons. In that regard, enclosed please find the information you have requested.

The NASD disclosure policy provides for the release of final disciplinary action(s), if any, taken by self-regulatory organizations or federal or state securities agencies that relate to securities or commodities transactions; and also includes criminal convictions, if any, reported to the NASD and required to be disclosed on uniform forms filed by NASD member firms or associated persons.

A list of the terms and conditions of the NASD Public Disclosure Program is printed on the reverse of this document.

MEMBER PERSON:JOHNSON (SR), MARSHALL HARDY

CRD NUMBER: 259892

PaineWebber

Full Account Title Louise D. Remmey

Branch GK

Account Number 00602

Broker 39

Arbitration 15. Any controversy between us arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the Arbitration Committee of the New York Stock Exchange, American Stock Exchange, National Association of Securities Dealers or where appropriate, Chicago Board Option Exchange or Commodities Futures Trading Commission,

as I may elect. I authorize you if I do not make such election, by registered mail addressed to you at your main office within fifteen (15) days after receipt of notification from you requesting such an election, to make such election in my behalf. Any arbitration hereunder shall be before at least three arbitrators and the award of the arbitrators, or of a majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.